1. This submission sets out the concerns of Maternity Action in relation to the introduction of employment tribunal fees in July 2013, and in particular the impact on women subjected to pregnancy- or maternity-related detriment or dismissal.

2. Maternity Action is the UK’s leading charity committed to ending inequality and improving the health and well-being of pregnant women, their partners and children. We deliver a well-respected and heavily used information and advice service, undertake research and policy analysis, and campaign to improve the rights of pregnant women and new parents. There are 10,000 downloads of our legal information sheets every month, and our free helpline answers some 2,200 calls each year.

3. This submission is supported by NCT, the UK’s largest charity for parents.

4. In March 2012, in our response to the Ministry of Justice’s consultation (CP22/2011) on charging fees in employment tribunals and the EAT, we noted the already high incidence of pregnancy and maternity discrimination by employers, and set out our concern that the prohibitively high fee levels then proposed would result in:

   A reduction in the number of women who suffer pregnancy-related detriment or dismissal seeking redress through the tribunal system; and

   A corresponding reduction in the deterrent effect of the tribunal system on such unlawful discrimination, leading to increased incidence.

All the available evidence leads us to conclude that these fears have been realised.

5. Bringing a tribunal claim is and always has been a daunting challenge at the best of times, but especially so for pregnant women and new mothers. At a time of immense physical and mental challenge, and when their income is most likely reduced and their outgoings hugely increased, many simply cannot countenance the likely time, stress and financial cost involved (in March 2014, the Department for Business Innovation & Skills indicated that on average it costs £1,800 to pursue a tribunal claim, not including fees). A 2005 research study by the then Equal Opportunity Commission found that less than 10 per cent of the women who suffer unlawful pregnancy-related detriment or dismissal took any kind of formal action, and only three per cent issued a tribunal claim.

6. Accordingly, the number of tribunal claims for pregnancy-related detriment or dismissal has never been huge (some claims arising from such discrimination may well be brought under other jurisdictions, but clearly there are no relevant statistics available). However, as the following chart shows, the number of such claims fell by some 40 per cent immediately following the introduction of fees in July 2013, from an average of 126 per month in the nine months up to June 2013, to an average of 76 per month in the six-month period September 2013 to February 2014 (i.e. prior to the implementation of Acas early conciliation in April, which appears to have prompted a modest, one-off increase in claims in this and other jurisdictions in March).
7. In a series of parliamentary, media and other statements, government ministers have suggested that some or even all of this evident fall in tribunal claim/case numbers can be explained by (i) an “historic downward trend” since 2010-11, quite possibly linked to improving economic and labour market conditions; (ii) “changes to employment law” such as the introduction of Acas early conciliation in April 2014; and “changes in users’ behaviour” such as bringing a claim in the county court instead of the tribunal.

8. However, the introduction of Acas early conciliation in April 2014 clearly cannot account for any of the 40 per cent fall in the number of pregnancy-related detriment or dismissal claims in the period September 2013 to February 2014. And, as pregnancy-related detriment or dismissal claims can only be brought in the tribunal, there cannot have been any displacement of such claims to the county courts.

9. As for the modest downward trend in overall claim/case numbers since 2010-11, the quarterly number of pregnancy-related detriment or dismissal claims did indeed decline by 12.6 per cent between Q1 of 2012-13 and Q1 of 2013-14 (i.e. the last full quarter before the introduction of fees. And, if we (generously) assume that claim numbers would have continued to decline at the same annual rate, we can generate a projection of likely claim numbers to compare against the actual claim numbers, as set out in the following chart.
10. From this analysis we can calculate the difference between the actual number of pregnancy-related detriment or dismissal claims, and the number of such claims we could have expected to see, had fees not been introduced in July 2013, and had the ‘historic downward trend’ identified by ministers continued at the same rate. By 31 March 2014 - i.e. immediately prior to the introduction of Acas early conciliation - a total of 179 such claims had been ‘lost to fees’, and by 31 March 2015 (the most recent date for which actual claim numbers are available), that figure had risen to 658.

11. Against this figure of 658 pregnancy-related detriment or dismissal claims ‘lost to fees’ between 29 July 2013 and 31 March 2015, we need to offset the number of potential claims successfully conciliated by Acas under the early conciliation scheme up to 31 March 2015. An accurate figure is not available, as (in contrast to the HMCTS statistics on tribunal cases) Acas does not publish (and has confirmed it does not hold) a statistical breakdown of early conciliation cases by outcome and jurisdiction. However, according to the Acas annual report for 2014-15, Acas received a total 1,873 notifications categorised as ‘maternity detriment’ up to 31 March 2015, and 15.1 per cent of all ‘open track’ early conciliation cases (i.e. including all discrimination cases) were successfully conciliated. In the absence of an accurate figure, this suggests that approximately 283 of the 1,873 maternity detriment cases notified to Acas under the early conciliation scheme were successfully conciliated.

12. Even if we then (generously) assume that all 283 women would have made a tribunal claim, had their case not been conciliated by Acas - some may well not have done, for the reasons identified in paragraph 5 above - that still leaves a balance of at least 375 pregnancy-related detriment or dismissal claims ‘lost to fees’, as of 31 March 2015.
13. The final argument put forward by ministers and others in defence of the fees regime is that all of the claims ‘lost to fees’ since July 2013 are ‘vexatious’ or otherwise weak claims that should never have been brought in the first place. In other words, we are asked to believe that every single one of the more than 375 pregnancy-related detriment or dismissal claims ‘lost to fees’ up to 31 March 2015 is a claim that should never have been brought in any case. But that is highly improbable, for two reasons.

14. Firstly, the historic success rate of pregnancy-related detriment or dismissal claims is very high: in 2013/14, of all such claims disposed of by the tribunal, 80 per cent were conciliated by Acas, were withdrawn (i.e. settled), were successful at a hearing, or resulted in a default judgment. Secondly, in recent quarters, far from rising from 80 per cent towards 100 per cent - as would inevitably happen if only ‘vexatious’ or weak claims had been deterred by fees - the overall success rate of such claims has steadily fallen, to 78 per cent in Q1 of 2014-15, 75 per cent in Q2, 71 per cent in Q3, and 74 per cent in Q4.

15. In conclusion, by 31 March 2015, some 400 tribunal claims for pregnancy-related detriment or dismissal had been ‘lost’ to the fees of up to £1,200 (subject to any remission) introduced on 29 July 2013, of which we can reasonably assume some 320 (80 per cent) would have resulted in a settlement or tribunal award. And, clearly, these numbers increase with each passing month. Not only does that amount to a significant reduction in the number of women seeking and obtaining justice in relation to such unlawful discrimination, but it amounts to a significant diminution in the deterrent effect of the tribunal system. And the deliberate creation of such a barrier to justice is deeply unfortunate when the latest detailed research - undertaken jointly by the Department for Business, Innovation & Skills (BIS) and the Equality & Human Rights Commission (EHRC), and published on 24 July 2015 - indicates that as many as 54,000 women are now forced out of their job each year on account of their pregnancy or maternity leave. Single mothers and younger mothers (under 25) are particularly at risk of such unlawful treatment.

16. Such pregnancy- and maternity-discrimination presents a massive challenge to women when they are least able to handle additional stress and financial cost. And, since the global financial crisis of 2008 and the onset of economic recession in the UK, there has been explosive growth in precarious forms of employment such as zero-hours contracts. Yet, in the words of former business minister Jo Swinson, “our economy simply cannot afford to lose the talents of 54,000 women a year”. So it is vital that all women who may have been subjected to discriminatory action retain effective access to justice.

17. Indeed, we end by noting that the creation of such a barrier to justice is detrimental not only to those women who are denied justice, but also to the great majority of law-abiding employers - who are denied a level playing field - and to the public policy goal of eliminating gender inequality. These are important, long-term considerations that far outweigh any short-term financial benefit to the Ministry of Justice (in terms of net fee income, and lower operational costs due to reduced case numbers). Accordingly, we believe that abolition (or a very substantial reduction in the level) of the fees must now be a priority for ministers. At the very least, if fees are not withdrawn across the board, we urge an exemption from fees for those claiming pregnancy-related detriment or dismissal.

20 August 2015