This submission to the Commons Inquiry is made on behalf of Peninsula Business Services Limited. Our organisation is a UK consultancy firm providing advice to companies primarily on employment law and health and safety. We provide support to over 29,000 clients. This support includes representing our clients during early conciliation and at the Employment Tribunal should proceedings be commenced against them. We are making submissions solely in relation to Tribunal fees. We have no objection to our submission being published.

Executive Summary
We believe that the fees have had a positive effect on the access to justice within the Tribunal system for the following reasons:

- No evidence that any claimant was put off from pursuing a claim due to the fee where their claim had any legitimate prospects of success.
- Fees do not pose a barrier to accessing justice.
- Fees have served to deter the pursuit of speculative claims.
- Fees have improved access to justice for all by helping to ensure that the tribunal’s resources are allocated effectively.
- The drop in claims is not solely due to fees and serves to demonstrate that the various changes and systems have increased the use of alternative dispute resolution for valid disputes.
- The remission system is most likely to assist vulnerable claimants so offsets any access concerns.

Submissions
1. As an organisation acting for companies we regularly represent companies during both the early conciliation process and any subsequent tribunal if proceedings are subsequently filed. Like others, we noticed a drop in the number of tribunal claims following the introduction of fees. However, while we are aware the fees have been challenged on the basis that the drop in claims must show that they are acting as a barrier to justice, we have seen no evidence of this.

2. Before fees were introduced, the tribunals formed a no risk option for people to pursue claims against their ex-employer, no matter how spurious. There was significant support available to claimants in pursuing claims at no personal risk or expense because of the availability of free representation. In addition, many people were actively encouraged to pursue tribunal claims. This encouragement could come from any insurance provider in the event of a claim for payment protection insurance or from the Department of Work and Pensions in the event that benefits are sought due to being out of work.

3. We used to be regularly involved in defending claims that had no genuine prospects of success but were being pursued solely on the basis that it was known that there would be a cost to an employer in defending the matter and the hope that an economic offer to settle the case would be made. These claims, regularly supported by representatives acting on a contingency fee basis, would often run for some time, with a settlement figure being sought that would meet the costs of the representative. If a settlement was not achieved then the claim would either be withdrawn or the
representatives would suddenly cease acting leaving a claimant to run a case alone having been given a false impression of the merits.

4. We found that our involvement in these cases often stopped them earlier, as representatives realised that they were not going to achieve a quick settlement and so get a significant reward for little work and pursuing unmeritorious claims ceased to be cost effective. However, a number of these claims would continue, particularly when it was known that the Respondent was vulnerable, due to ill health, family bereavement or financial pressures on the organisation, in the hope that the Respondent would bow to the pressure and settle a claim even though they had good prospects of success in defending it. This had the effect of denying access to justice to Respondents.

5. The introduction of fees has helped to redress this balance. We have seen a reduction in the number of cases where a small economic settlement is the goal because the additional cost of the fees makes those settlements less likely. This is reinforced by the number of matters raised in early conciliation, which remains a free service, where a small economic settlement is sought that do not subsequently result in a tribunal claim.

6. Early conciliation has had a significant impact in reducing the number of tribunal cases, as it was intended to do. The existence of tribunal fees adds an impetus to that process that helps to make it more successful. Claimants are more inclined to consider settlements, including solutions that are outside of those a tribunal can order, because they have to accept some financial risk to pursue matters further. Respondents are also more inclined to consider reasonable settlement, if there is some risk towards them because they are aware that they will have to repay the fees if they lose.

7. The financial risk combined with a chance to properly explore the issues prior to any proceedings has helped resolved many claims without the tribunal becoming involved. This includes the identification of those issues which would mean that a claim could not succeed due to jurisdictional problems or because the correct meaning of the law can be explained. This prevents claims from entering the tribunal process that have no reasonable prospect of success and avoids the resources of both parties and the tribunal being used unnecessarily.

8. We have seen no examples of a matter raised in early conciliation, where the claimant had an arguable case but settlement could not be achieved, not continuing to tribunal as a result of the fees. We have seen more cases continuing to tribunal where the claim is weak if the claimant will not be meeting the fees personally.

9. The legal market has adapted to meet the issue of fees for claimants. We have come across representatives offering access to after the event insurance or offering a contingency fee approach to a claim where the representatives meet the fees with a view to recovering them as part of any settlement.

10. There were some teething problems initially with the fees in relation to the remission scheme. Most noticeably the difficulty was not that the remission scheme would not help to ensure that those who could not meet the fees themselves could still access the system but that the process for supplying the relevant information to apply for
remission was poorly designed. However, that problem has now been resolved and the remission scheme serves to ensure that there is no barrier to justice for financial reasons.

11. We believe that there are two main indications that fees are not discouraging claimants from pursuing valid claims. Firstly, in response to the drop in tribunal claims there has not been a commensurate increase in claims, particularly low value monetary claims, in an alternate jurisdiction, such as through the civil courts, where the fees would be lower. We believe that the fact that, unlike the tribunals, the courts operate on the principle that the loser pays the winners costs shows that the real deciding factor on pursuing claim is the perceived strength of that claim and not the level of any fees. Secondly, a statistically significant number of claimants chose not to engage in early conciliation despite the fact that it is free and if it was successful then they would not have to incur any tribunal fees.

12. We would also submit that the drop in tribunal numbers is not solely attributable to the introduction of fees but has been significantly affected by changes in the law along with some key precedent decisions. The qualifying threshold for claiming unfair dismissal has been increased. At the same time the definition of whistleblowing changed, requiring that a protected disclosure required some element of public interest rather than simply being able to refer to a breach in the employee’s own contract of employment, which reduced the number of claims seeking to bypass the qualifying threshold for unfair dismissal. The decision in Bear Scotland in relation to holiday pay and the impact on backdating claims for deductions of pay will significantly impact on case numbers because the value of claims will significantly reduce.

13. One important issue not to overlook is the economic position of the country and the level of unemployment. Claimants are more likely to pursue claims if they will be out of work for some time because they have no source of income and their anticipated losses mean that the claim is assessed at a higher value. The fact that they have no income also means that they believe that they are protected against any application for costs because, as has been relayed to us frequently, they do not have any money so it will not be awarded.

14. As the economy improves, the risk/reward balance in pursuing a claim changes. If claimants are in work then the overall value of the claim is lower and the financial risk of pursuing a weak claim is higher. The incentive for pursing a claim is also lower if the individual has obtained other work so is not seeking to claim under payment protection insurance or is trying to prevent benefit sanctions.

15. Companies are still finding themselves having to defend against unmeritorious claims but in the majority of cases these appear to be where the claimant has no income and so is not having to meet the fee personally and is not concerned about being ordered to meet any costs award. This suggests that it is not that fees are preventing people with valid claims from accessing justice, but that they are discouraging claims being pursued solely with the goal of achieving a commercial settlement. This helps to ensure that the tribunal service can focus its resources on the remaining cases and allows a better balance in respect of access to justice for both parties.
16. Respondents do not choose to enter into the tribunal process but are faced with a stark choice of incurring the costs of defending a case, including the time and stress, or settling. There is no support available for respondents to defend claims, even where that Respondent may be a disabled person who by virtue of the direct payments scheme is treated as the employer of the people assisting them with their care needs. Access to justice for them means not being put in a position where they can be taken advantage of by their former carer bringing a spurious claim. The fees system is the only level of protection they have. Access to justice has to be considered for both sides and not just claimants.

17. The remission system works well to address any specific difficulties for low paid groups and vulnerable claimants as they are more likely to be eligible for remission. This offsets any disadvantage towards those who, statistically, are more likely to have little or no income so that the fees could cause a problem if there was no assistance available.

18. There is no right that says justice for civil matters should be free at the point of access. Even with the fee system the tribunal fees are a cheaper option that poses less financial risk to a claimant while giving access to a specialist service. It is right that the people who are using that service should help to support it rather than the cost being met by the taxpayer in general. The fees help to remind claimants that litigation should be a last resort and help to encourage the use of alternate dispute resolution. It also helps to put parties on a more equal footing as there is always a cost to respondents in defending claims.

19. Our statistics show that the number of claims had potentially already started to drop prior to the introduction of fees. This is harder to assess because of the skewing effect in tribunal claims lodged in 2013 that were filed early to avoid the tribunal fees combined with the significant early delays as central processing of claims and tribunal fees came into effect. We believe that the second stage drop in 2014 shows the impact of early conciliation on top of the earlier legislative changes. Our statistics also show a drop of numbers in Northern Ireland, where fees have not been introduced and no early conciliation scheme currently exists.

20. The change in claim numbers in the different countries within the UK we have received is shown in the following table:

<table>
<thead>
<tr>
<th>Country</th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
<th>2015 (so far)</th>
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<tbody>
<tr>
<td>England</td>
<td>2404</td>
<td>1797</td>
<td>822</td>
<td>514</td>
</tr>
<tr>
<td>Scotland</td>
<td>201</td>
<td>118</td>
<td>82</td>
<td>40</td>
</tr>
<tr>
<td>Wales</td>
<td>148</td>
<td>134</td>
<td>33</td>
<td>19</td>
</tr>
<tr>
<td>Northern Ireland</td>
<td>51</td>
<td>66</td>
<td>65</td>
<td>79</td>
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21. The early conciliation numbers show the impact that this process has had on tribunals. Early conciliation was introduced as a voluntary process in April 2014 before becoming mandatory on 6th May 2014. We will not necessarily be notified of early conciliation prior to being instructed on a tribunal claim. In most cases the reason will be that the claimant has not given permission for ACAS to contact the respondent. In some cases ACAS will have been unable to speak to the claimant in order to move the matter forward. In some cases ACAS will have been unable to contact the respondent or the respondent has chosen not to participate in early
conciliation. Finally some clients join us after the early conciliation process has concluded. Even taking this into account, we were notified of **783 requests for early conciliation in 2014** and have been notified of **755 requests for early conciliation so far in 2015**. We believe that these figures show the success of the early conciliation process with a significant number of matters not progressing into the tribunal system.

22. In relation to County Court claims, which we refer on as they constitute reserved work, while we have seen an increase in claims, which will reflect the fact that it is cheaper to pursue monetary claims in the County Court, the numbers do not indicate a wholesale shift as would be expected if the fees were a significant deterrent. Our statistics are as follows:

<table>
<thead>
<tr>
<th></th>
<th>2012</th>
<th>2013</th>
<th>2014</th>
<th>2015 (so far)</th>
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<tr>
<td></td>
<td>0</td>
<td>10</td>
<td>24</td>
<td>38</td>
</tr>
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23. We believe that there are a number of other factors that will result in the increase in County Court claims including the time limits on how far back amounts can be claimed at tribunal compared to the County Court and that there are caps on tribunal claims.

24. We would submit that, from our experience, the tribunal fees are a proportionate means of ensuring that the tribunal service is funded by its users and betters balances the rights of both parties for access to justice than the previous free system. They have, in the main, improved the quality of the claims presented at tribunal although an issues still remains in respect of those claims where the claimants are not personally liable for any fees and their financial circumstances mean that they are not at realistic risk of being faced with a deposit order or costs award.

25. We would ask the Committee to consider clarifying an issue in respect of fees in circumstances where they are not being met by the claimant personally. Where there is an insurance policy funding a claim, or the fees are being met by representatives acting on a contingency basis, we would ask that consideration be given to the ability of the people funding the claim to meet any fees, deposit orders or costs rather than the claimant’s own financial circumstances. This will not pose any significant barrier to justice because where there is merit in the claim there should be no concern about meeting the fees and representatives generally have insurance to cover against losses. However, this will help to ensure that unmeritorious claims are not being pursued through the tribunal process simply with a view to pressurising the respondent into economic settlement on the basis that there is no real financial risk. This is particularly important given the conflicting views as to whether or not fees can be repaid where they have been paid by someone who is not a party to the proceedings.

We thank you for the opportunity to provide our comments on this matter and would be happy to provide further information if that would be of assistance in this matter. We would welcome the opportunity to be involved further if possible.

*29 September 2015*