Written evidence from the Bar Council

1. This is the response of the General Council of the Bar of England and Wales (the Bar Council) to the House of Commons Justice Select Committee’s request for written submissions for its inquiry into courts and tribunals fees and charges.¹

2. The Bar Council represents over 15,000 barristers in England and Wales. It promotes the Bar’s high quality specialist advocacy and advisory services; fair access to justice for all; the highest standards of ethics, equality and diversity across the profession; and the development of business opportunities for barristers at home and abroad.

3. A strong and independent Bar exists to serve the public and is crucial to the administration of justice. As specialist, independent advocates, barristers enable people to uphold their legal rights and duties, often acting on behalf of the most vulnerable members of society. The Bar makes a vital contribution to the efficient operation of criminal and civil courts. It provides a pool of talented men and women from increasingly diverse backgrounds from which a significant proportion of the judiciary is drawn, on whose independence the Rule of Law and our democratic way of life depend. The Bar Council is the Approved Regulator for the Bar of England and Wales. It discharges its regulatory functions through the independent Bar Standards Board.

Overview

4. The Bar Council welcomes the opportunity to express its concerns about the Government’s policy of shifting the costs of Her Majesty’s Court and Tribunals Service (HMCTS) from the public purse to courts and tribunals users. There have been significant reforms implemented over the past two years, with the introduction of fees for Employment Tribunals on 29 July 2013, an increase in civil court fees for money claims from 9 March 2015 and the implementation of the compulsory criminal courts charge on 13 April 2015.

5. The Bar Council believes that a fair, efficient and accessible civil justice system is one of the fundamental pre-requisites of an effective democratic society. While the Government has highlighted in recent consultations that HMCTS costs £1 billion per year more than it receives in income,² this fails to take into consideration the fact that all members of society, and society as a whole, benefit from the existence and proper administration of justice and it is therefore right that a significant proportion of the costs of the system should be borne by taxpayers as a whole.

6. The Bar Council is particularly concerned that the Government has just completed another consultation on additional increases to court fees for civil courts and tribunals.³ This

³ Ministry of Justice (2015) Consultation on further fees proposals. Available at:
was especially problematic as the Government has not yet reported on the impact of the fee increases implemented on 9 March 2015 and the introduction of fees for the Employment Tribunal in July 2013. Without this information, the Government is putting forward yet further proposals based on perception rather than evidence.

**How have the increased court fees and the introduction of employment tribunal fees affected access to justice? How have they affected the volume and quality of cases brought?**

**Civil court fees**

7. In March 2015, issue fees for money claims of £10,000 or greater were set at 5% of the value of the claim, up to a cap of £10,000. The Government has recently consulted on increasing this fee cap to £20,000, and has even proposed removing the cap altogether. The Bar Council raised serious concerns about the introduction of this fee increase, and the Bar Council response to the most recent Government consultation on further fees proposals is attached to this submission.

8. The Government’s most recent consultation has indicated that the Government is monitoring the impact of enhanced fees introduced in March 2015 on case volumes. This monitoring data, however, will not be published until the Government is in a position to issue a response to the most recent consultation on further court fee increases. This timeline is unfortunate as it means that the Government is not in a position to develop policy and consult on the basis of proper evidence. The court statistics for April-June 2015 have been published, but a longer period of data will be required before full conclusions can be drawn.

9. It is important to understand that there is no necessary link between the size of a claim, the complexity of the issues to be resolved and a potential litigant’s ability to pay a court fee. It is also worth noting that non-money claims, which can be just as or even more complicated than high value money claims and take as much court time, cost a maximum of £480 to issue. This means that claimants with money claims greater than £10,000 in value are comparatively disadvantaged in pursuing their dispute through the courts even though there is no reason to believe the legal issues will be more complex or less meritorious.

https://consult.justice.gov.uk/digital-communications/further-fees-proposal-consultation


10. Immediately prior to the introduction of enhanced court fees in March 2015, the Bar Council invited members of the Bar to indicate their concerns about the introduction of the fees. While the 92 responses received do not amount to a representative sample of the profession, they do indicate that the Bar had serious concerns about the impact of enhanced fees on access to justice for parties looking to resolve disputes in the civil courts. The responses received indicated that members of the Bar were especially concerned about the impact on access to justice for individuals pursuing negligence or personal injury claims and small businesses pursuing debtors.

11. The Bar Council has already received anecdotal reports that these concerns were not misplaced. There are accounts of clients who have decided not to pursue meritorious claims due to the level of court fees that have to be met to begin any litigation. There are many individuals and business who simply do not have access to the necessary funds to cover fees up to £10,000. This is particularly the case where the client’s legal issue has led to the loss of their income, putting them in the invidious position of not being able to pursue their claim because of the impact of the wrong they are seeking to remedy. There have also been concerns raised that for claims pursued under conditional fee agreements (‘no-win, no-fee’), where the burden of paying court fees up-front is generally borne by solicitors, there is now yet even greater incentive for solicitors not to accept cases where they are anything less than certain of success.

**Employment Tribunal fees**

12. Employment Tribunal charges were introduced from 29 July 2013. There have been serious concerns raised about the impact of these fees on the ability of individuals to pursue employment-related disputes. We draw to the Committee’s attention the deep unease over this issue felt by the members of the specialist bar association, the Employment Law Bar Association (ELBA). ELBA wrote to the Lord Chancellor and other MPs about fees on 16 March 2015. This letter is attached and was signed by 40 QCs and a little under 400 junior barristers who specialise in employment law.⁸

13. Statistical evidence of the number of claims brought since the introduction of the new fees regime was usefully summarised in *R (on the application of Unison) v Lord Chancellor (ECHR intervening)*,⁹ where the Court of Appeal referred to detailed Ministry of Justice statistics which were submitted in evidence.¹⁰ We also draw the Committee’s attention to the fact that by June 2015 the latest quarterly statistics showed no significant increase in the number of claims being lodged in the Employment Tribunal when compared with previous quarters over the past year. Single claims in the quarter to March 2015 averaged 1,400 per month; this figure is just a little higher than the comparable figures for each quarter in the

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⁹ [2015] EWCA Civ 935, [62]

¹⁰ The Government website where all the relevant statistics are located is at: [https://www.gov.uk/government/collections/tribunals-statistics](https://www.gov.uk/government/collections/tribunals-statistics) We also ask the Committee to look at the MOJ’s “Tribunals and Gender Recognition Certificate Statistics Quarterly January to March 2015” as a useful background to these statistics.
previous year, and compares with an average monthly rate in the year before fees were introduced of just under 4,500.

14. We also invite the Committee to note the view expressed by Underhill LJ in *R (on the application of Unison) v Lord Chancellor (ECHR intervening)* that:11

   I have a strong suspicion that so large a decline is unlikely to be accounted for entirely by cases of "won't pay" and that it must also reflect at least some cases of "can't pay"; and I have accordingly been tempted by [the] submission that the figures speak for themselves...

15. Despite the outcome of that case, we ask the Committee to take the statistics relied upon with the utmost seriousness and, even if the Court of Appeal did not have before them evidence of the actual affordability of the fees in the financial circumstances of (typical) individuals, there is still a huge concern that the fees payable under the 2013 Order are realistically unaffordable in some cases.

16. On 1 September 2015 the Scottish Government announced that it will abolish Employment Tribunal fees as part of the transfer of Tribunals to the Scottish Courts and Tribunals Service under the Scotland Bill.12 The Committee may wish to consider whether two systems operating in parallel, one with fees and one without, might provide a body of evidence as to the deterrent effect of fees in England and Wales.

**How has the court fees regime affected the competitiveness of the legal services market in England and Wales, particularly in an international context?**

17. The Bar Council’s 2014 response to the Government’s consultation on proposals for reform of court fees,13 referred to our concerns about the impact of fee increases on the competitiveness of the legal services market in an international context. The Bar Council continues to believe that the increase of court fees, both those that have been implemented and those more recently consulted on, will damage the United Kingdom’s position as the leading centre for commercial dispute resolution. This will undo much of the good work done by the Ministry of Justice through its excellent “Plan for Growth” and is likely to lead to a serious loss of work from the UK courts, its lawyers and support services, resulting in damage to the wider economy.

18. Our competitors already argue that London is an expensive venue for dispute resolution. The Foreword to the Ministry of Justice’s “Plan for Growth” recognised the

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11 [2015] EWCA Civ 935, [68]
importance of cost when decisions about dispute resolution are made.\textsuperscript{14} The Lord Chancellor and Secretary of State for Justice, and the Minister for Trade & Investment wrote that:

While the UK’s excellence and reputation is undoubted, costs and speed may affect where companies choose to resolve their disputes. We intend to do all we can to protect our competitiveness and build on our success.

19. This intention appears to be contrary to the proposals to yet further increase the cost of litigation in England and Wales. The Bar Council is unconvinced that there will be a net gain in revenue to the government from the fee increases once lost tax revenue from substantial international commercial litigation is taken into account. It is too early, however, to be able to provide evidence on this point as the fee increases only took effect from 9 March 2015. We also note that the monitoring information expected to be published with the Government response to the latest consultation on further fee increases will be particularly focused on the impact of the March 2015 increases on ‘high value money claims and those issued in the Commercial Court’.\textsuperscript{15}

20. The United Kingdom is rightly proud of the reputation that London has as a forum for the resolution of international commercial disputes. The benefit of this work to the United Kingdom economy has been recognised by the government’s investment in the Rolls Building. That investment implicitly recognises the highly competitive nature of the market for international litigation. The intensification of worldwide competition for legal services as more international cities compete with London and other UK jurisdictions as hubs of legal expertise was also recognised by the Ministry of Justice in its “Plan for Growth”.

21. Much of the international work heard in the Rolls Building comes because the parties voluntarily agree to jurisdiction clauses which select London courts. Often but not necessarily they will also choose English law. A number of our competitors are promoting the possibility of still using English law but choosing their courts or arbitration centre. Our competitors already focus on cost as a reason for not litigating in London, arguing that their jurisdictions offer more cost effective dispute resolution, whether through courts or arbitration.

22. The Bar Council is concerned that the enhanced fee charging in commercial proceedings will substantially undermine London’s attractiveness as a centre for international litigation. As the research conducted for the Ministry of Justice by the Centre for Commercial Law Studies at Queen Mary shows,\textsuperscript{16} the proposed fees would make court fees in London the most expensive in the world. The only jurisdiction that charges issue fees

\textsuperscript{15} Ministry of Justice (2015) Consultation on further fees proposals, paragraph 71. Available at: https://consult.justice.gov.uk/digital-communications/further-fees-proposal-consultation
\textsuperscript{16} Centre for Commercial Law Studies School of International Arbitration, Queen Mary University of London (2013) ‘Competitiveness of fees charged for Commercial Court Services: An overview of selected jurisdictions’. Available at: http://www.law.qmul.ac.uk/docs/news/118693.pdf
comparable to those proposed is the Dubai International Financial Centre. The Bar Council is particularly concerned that in the courts of New York, which is London’s closest competitor, it costs as little as $400 (approximately £260) to issue a claim. The Bar Council anticipates that New York attorneys will not be slow to seize on any significant disparity in court fees to the cost of the United Kingdom economy.

**What have been the effects on defendants of the introduction of the criminal courts charge? Has the criminal courts charge been set at a reasonable and proportionate level? Is the imposition and collection of the charge practicable and, if not, how could that be rectified?**

23. The Bar Council is very concerned about the impact of the compulsory criminal courts charge. The Prosecution of Offences Act 1985 (Criminal Courts Charge) Regulations 2015 (SI 2015/796) were laid before Parliament on 23 March 2015. The timing of this Statutory Instrument (SI), immediately before the dissolution of the last Parliament, meant that there was little or no opportunity to allow for a possible Parliamentary debate.

24. This lack of scrutiny was subject to criticism from the House of Lords Secondary Legislation Scrutiny Committee in a report published on 9 June 2015. The First Report of the Secondary Legislation Scrutiny Committee also identified that the statutory instrument and the Impact Assessment provided with the Explanatory Memorandum gave different estimates on the income to be generated by the new charges. The report concluded:

Moreover, the lack of an updated estimate of the sum likely to be raised by the actual charges makes it impossible to take a clear view of how well the Regulations will serve their intended purpose.

25. There are a number of troubling problems created by these new Regulations:

a) Defendants will be incentivised to plead guilty whether or not they have committed the offence charged. The large differential in charges imposed upon those who have been convicted following a trial as opposed to a plea of guilty may well influence the decision made by individual defendants as to their plea. This is particularly likely in circumstances in which the sanction is likely to be low, where reputational damage is minor. If, as will often happen, the charge levied is disproportionate to the seriousness of the punishment likely to be imposed by the court, this risk will be exacerbated.

b) The charges are very high, ranging from £150 to £1,200, and may be significantly higher than the penalties for the substantive offence. There is therefore a real risk of a penalty which has no proportionate relation to the seriousness of the offence.

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committed. This is contrary to the principle that the gravity of the punishment imposed should be proportionate to the seriousness of the offence committed.

c) The Court is given no discretion to take account of an individual’s ability to pay the charges. Those who appear before the criminal courts are very often amongst the poorest and most vulnerable in society. A significant proportion have mental health problems. We find it troubling that there is no mechanism in place for the court to take into account the means of the individual or their personal circumstances when imposing these charges.

d) These charges are likely, in many cases, to have a significant effect upon the financial stability of the defendant once they have resumed their position in society. In addition, we take the view that the imposition of substantial charges has the potential to have a serious and damaging effect upon family members caused by additional pressures upon the defendant.

e) The imposition of a substantial charge has the potential seriously to damage the prospects of rehabilitation of the offender in the community. People who have been convicted by the courts face great difficulty in obtaining employment upon the resumption of their lives after punishment. We are concerned that, particularly where they have been punished for acquisitive crime, there is a real risk that they will feel pressurised to commit further offences, they being otherwise unable, in any lawful way, to obtain the large sums of money demanded from them by reason of the imposition of the statutory charge.

f) The Bar Council believes that these charges are likely to be ineffective as a means of raising funds. We understand that the Ministry of Justice faces significant problems collecting fines. In part this will be to do with the fact that individuals are unable to pay them. These charges will simply exacerbate these problems and we question whether the amount recovered will be in proportion to the cost of enforcing the payments. Resources that will need to be spent on recovering payments will be diverted from other, more pressing needs.

26. The Howard League for Penal Reform has recently launched a campaign for the urgent review of the criminal courts charge. As part of this, they have compiled more than thirty cases that highlight the impact of the criminal courts charge, including the following:19

a) A 26-year-old homeless man who stole a can of Red Bull worth 99p from a supermarket in South Shields, Tyne and Wear, was given a conditional discharge and ordered to pay a £150 criminal courts charge and a £15 victim surcharge.

b) A 30-year-old homeless woman was convicted in her absence of begging in a car park in Coventry, West Midlands. She was ordered to pay a £150 criminal courts charge, a £30 fine and a £20 victim surcharge.

c) A 20-year-old man who was living in a hostel in Stoke-on-Trent, Staffordshire, kicked out at a flower pot after being stabbed with a needle by a fellow resident. He became homeless. He admitted criminal damage, which placed him in breach of two conditional discharges that were imposed on him for thefts. He was fined £70 and ordered to pay a £150 criminal courts charge, £85 costs and a £20 victim surcharge.

d) A 37-year-old woman who stole shampoo worth £2.39 from a shop in Banbury, Oxfordshire, was given a six-month conditional discharge and ordered to pay a £150 criminal courts charge, £35 costs and a £15 victim surcharge.

e) A 41-year-old man who stole two tubs of ice cream worth £9.58 from a shop in Coventry, West Midlands, was given a six-month conditional discharge and ordered to pay a £150 criminal courts charge, £85 costs and a £15 victim surcharge.

f) A 27-year-old man who “trespassed” at a shop in Poole, Dorset, and stole three cans of drink to a value of £6.64 was ordered to pay £6.64 in compensation, a £15 victim surcharge and a £180 criminal courts charge.

g) A 26-year-old homeless man who admitted stealing drinks and chocolate worth £4.80 from a shop in Mansfield, Nottinghamshire, was jailed for four weeks because of his lengthy record and made to pay a £150 criminal courts charge and an £80 victim surcharge.

h) A 19-year-old man admitted stealing sweets and ice cream to the value of £5 from a supermarket in Torquay, Devon, whilst subject to a conditional discharge imposed for two thefts. He was ordered to pay a £35 fine, a £180 criminal courts charge, a £20 victim surcharge and £85 costs.

i) A 38-year-old homeless man admitted persistently begging in Oxford, Oxfordshire, and breached an Asbo prohibiting him from sitting within 10 metres of a cash machine. He was jailed for 30 days and ordered to pay a £150 criminal courts charge.

j) A 31-year-old woman from Mansfield, Nottinghamshire, admitted stealing shower gel worth £2.39 from a pharmacy. She was jailed for 14 days and ordered to pay a £150 criminal courts charge, a £20 victim surcharge and £2.39 in compensation.

27. In has been reported that the implementation of the compulsory charge has already seen more than fifty Magistrates resign from the bench. Richard Monkhouse, Chairman of the Magistrates’ Association, has raised concerns expressed by his members:20

20 Emily Dugan, ‘Crippling court costs force poverty-stricken people to ’plead guilty to crimes they
The chief concern of our members is the observation that pleas are being influenced by the charge. Defendants may be pleading guilty in order to avoid a larger financial penalty. We are seeing experienced magistrates resigning from the bench, and we expect this figure to increase as the cycle of trials with the charge kicks in.

28. The Bar Council has in the past supported the principle of imposing a modest levy to be paid by those convicted of criminal offences, to be assessed in accordance with the financial resources of the convicted defendant, as a means of supporting the legal aid fund. There is a very important difference between such proposals and those which have been passed. The Regulations involve the imposition of a non-discretionary, flat and substantial charge, payable regardless of the defendant’s means and without any regard to the actual costs of the case. In our view this is unjust.

29. The Bar Council welcomes the Lord Chancellor’s recent statement that he is aware of widespread concern, that there will be a review of the charge and that the charge should be linked to an offender’s means and ability to pay. The Bar Council looks forward to receiving further details of the review.

September 2015

didn’t commit’’ (Independent, 21 August 2015). Available at:

21 House of Commons debate 8 September 2015, vol 599, col 217:
http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm150908/debtext/150908-0001.htm#15090844000226