Written evidence from The Law Society of England and Wales

The Law Society of England and Wales (‘the Society’) is the independent professional body, established for solicitors in 1825, that works globally to support and represent its 163,000 members, promoting the highest professional standards and the rule of law.

The Society welcomes the opportunity to present evidence to the Justice Committee's (the Committee) inquiry. We have set out our response to each of the questions posed by the Committee's terms of reference.

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?

Increased court fees

1. In our response to the Government's consultation on enhanced court fees in February 2015 we said that higher fees would prevent individuals and companies from accessing justice making society as a whole less fair and less just. The courts provide an essential service in a democratic society. They ensure the rule of law is upheld by enabling disputes to be resolved in a fair and transparent manner. It prevents individuals from taking the law into their own hands and clarifies the law for all concerned. The courts are therefore a public good and should not be treated as a commercial enterprise.

2. The February 2015 consultation stated that the case for reform was based firmly on the need to protect access to justice. We believe that higher fees will have precisely the opposite effect. It is no argument to say that fee remissions will be available for those on lower incomes, especially as the impact assessments assume that eligibility for fee remissions will be unchanged. The income level at which fee remissions is available is far too low to be of any assistance to the majority of individuals. There are many clients who are on incomes that are very low, but not low enough to qualify for fee remission, and who could not possibly afford to pay up to £10,000 up-front to issue a claim. The process of applying for the remission of court fees is also highly complicated, designed seemingly to deter ordinary people from applying, and in urgent need of simplification. One of the assumptions of the impact assessments is that user demand will not change in response to planned fee rises. This is unrealistic. Recent experience shows that increasing fees is having an impact on the number of claims brought.

3. We have provided further information on the impact of increased court fees below at the additional terms of reference question. In summary the Society considers that: it is wrong in principle for the courts and tribunals to be used as a profit centre for government as they perform a vital social function and should not be treated as a commercial activity; higher fees will discourage people from bringing legitimate cases, reducing access to justice while disproportionately affecting some groups such as those on low incomes or with certain disabilities; it is inappropriate for fees to be raised again so soon after the March 2015 increases without any assessment of the impact of those increases having been made and; before an assessment of the cumulative impact of the fee increases on the competitiveness of London as a centre for dispute resolution. Below we have set out some of the areas that fee increases will limit access to justice.

Introduction of Employment Tribunal fees

4. The evidence suggests that the introduction of Employment Tribunal (ET) fees have harmed access to justice and since July 2013 many people are not able to enforce their employment rights. It is likely that other factors, such as the economic upturn and the introduction of the Advisory, Conciliation and Arbitration Service early conciliation, have
had some impact on the decline in the number of ET cases, but we are of the view that the impact of these factors is minor compared to the consequences of ET fees. Our members have told us that claimants with strong cases see the fee as a significant deterrent to pursuing a complaint. We also know of examples where respondents have refused to consider engaging in early conciliation or settling the matter before it reaches the tribunal because they wanted to "call the claimants bluff" on whether the employee would pay the fee.

The ET fee is high compared to earnings

5. We surveyed our members about the impact of fees in the courts and tribunals. One member told us that they: "volunteer at a legal advice clinic and have come across a lot of reluctance among low to middle income claimants to bring employment tribunal claims as a result of the issue and hearing fees. These fees are impacting access to justice for ordinary people."[1]

6. A survey of employment cases brought to Citizens Advice Bureau (CAB) (2014) found that 4 in 5 potential cases assessed as having a better than 50 per cent chance of success are not pursued by people in the ET.[2]

7. The ET fee is prohibitively high for most people. The average monthly take home salary is £1,792.27 per month[3]. Further research by the CAB found that just under half of people with an employment issue would have to save for six months to afford fees of £1,200[4]. This puts claimants at a disadvantage as for most cases you have to bring your claim within three months less from the date of dismissal or for discrimination claims, when the first complaint was made.

The ET fee is high compared to awards

8. In response to our survey, one member told us that: "Employment Tribunal fees cannot be met by most potential litigants. The risk is now as great as the reward and capped payouts mean those with the lowest incomes have the greatest risk."[5]

9. The levels of compensation awarded in most tribunal cases are modest compared to the fee. For example,
   - Disability discrimination: The average award is £7,536, with 18 per cent receiving less than £3,000 and 29 per cent less than £5,000.
   - Race discrimination: The average award is £4,831 with 28 per cent of those awarded compensation receiving less than £3,000 and 46 per cent less than £5,000.
   - Sex discrimination: The average award is £5,900, with 22 per cent receiving less than £3,000 and 39 per cent less than £5,000.[6]

10. According to the Funding Code published by the Legal Aid Agency a reasonable person[7] would not litigate a claim with 50-60 per cent prospects of success unless the likely

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1 Evidence sent to the Law Society by an employment solicitor - September 2015.
2 Response to Law Society survey on further court fee increases - August 2015.
4 (Office of National Statistics, Annual Survey of Hours and Earnings, 2013 Provisional Results)
6 Response to Law Society survey on further court fee increases - August 2015.
7 Employment and EAT Tribunals Quarterly Statistics (March 2014).
8 That is, someone who would be prepared to risk his or her own money and bear the risk of having to pay the costs of the other side. The reasonable person test takes into account all the circumstances of the case including the prospects of success, likely benefits to be gained and likely costs incurred. The fact that the individual may feel very strongly about the case or be determined to go to court, however, is not in itself relevant.
damages were at least four times the likely cost of pursuing the case. Four times the fee for a discrimination based case is £4,800. If you add on the other costs involved in making a claim many of those who have a valid discrimination claim will have to make a financial commitment that is above the Legal Aid Agency’s threshold.

Even if you win there is a high chance that the fee will not be reimbursed

11. Members have advised claimants not to pursue valid cases “because there is a high chance that their fee won’t be refunded, even if they are successful”9 and many ET awards are never paid.

12. This feedback from our membership is supported by a study performed by the Department for Business, Innovation & Skills (2013)10 that found that only 49 per cent of ET awards were paid in full, with a further 16 per cent paid in part, and 35 per cent receiving no money at all.

The remission system is not helping as many people as it should

13. Members report that the ET fees are providing a psychological barrier which stops many from pursuing a complaint. Since the introduction of fees members report a big decline in the numbers of people who seek initial advice on their claim. Many people are not aware that they can get remission.

14. In our experience the remission system is confusing, uses complicated language, and is hard to navigate. CAB research found that only three in ten potential claimants were aware of the existence of financial support for those on low incomes. CAB also found that half of claimants who thought they weren’t eligible actually were11.

15. When ET fees were first proposed the Ministry of Justice believed that between 11 - 13 per cent of claimants would benefit from full remission and 53 per cent of claimants would benefit from a variable discount on fee rates up to £95012. Statistics show that only 21 per cent of claimants have benefited from any remission13. This gives a strong indication that the remission system is not working well.

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

16. The Society has called on the government to undertake an assessment of the cumulative impact on the competitiveness of London as a centre for international dispute resolution and the extent to which fees have led to any move of international clients to cheaper jurisdictions.14

17. The cost of litigation is high. The increase to court fees in March 2015 has simply inflated the costs for parties to a dispute for no discernible increase in service making England and Wales a less attractive place for dispute resolution. Competitors to England and

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9 Response to Law Society survey on further court fee increases - August 2015.
14 Response to Law Society survey on further court fee increases - August 2015.
Wales for high value dispute resolution are already offering a cheaper alternative. The government has relied on the excellent reputation of English and Welsh courts and judiciary as an inoculation against any drop in business that may result from the increased fees. It is simple business logic that, where a legal system offers, stability, predictability and enforceability of judgments, business will follow. England and Wales certainly offers that, but it is not unique in that regard and there are competitors that offer the same service but at a significantly lower cost. For example, to initiate proceedings in the Supreme Court of New York in the United States of America a party need only pay US$210 (£138) and an additional charge of US$95 (£62) if the dispute requires judicial intervention.  

18. The government points to the reputation of English and Welsh jurists as a point of differentiation. The excellent reputation of the English and Welsh judiciary has not gone unnoticed by competitors. The Singapore International Commercial Court (SICC) and the Dubai International Finance Centre Courts both count three former High Court judges and one former Court of Appeal judge among their members in addition to members from other common law jurisdictions. Like the Supreme Court of New York, an action can commence in the SICC for significantly less than in England and Wales. Filing costs SG$3,500 (£1,609) with the same payable again for each day the trial takes. So whether it's on cost or reputation, alternative venues to England and Wales as a jurisdiction of choice are competing for high-value dispute resolution business.

19. When the fee increases were first proposed at the beginning of this year we asked our members what they thought the impact of fee increases of the magnitude now in place would be. Our members told us that it would damage the reputation of England and Wales. Our members also acknowledged the expertise and reliability of our courts in deciding international disputes. However, the fee increases appeared to their clients as simple price gouging. Rightly or wrongly, if that's the perception among potential users of our courts, it will drive business elsewhere reducing the amount of fee revenue for the government leaving the Government's financial position no better off, a damaged court reputation and an additional restriction on the English and Welsh legal service sector's ability to compete.

20. The Law Society recommends that the Committee request the government conduct a proper examination into the competitiveness of England and Wales and the factors considered by parties when selecting a jurisdiction of choice.

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?

21. The introduction of the criminal court charge is having a substantial and perverse impact upon criminal justice in England and Wales. When the government announced its intention to introduce the criminal courts charge we were disappointed that it was being done so without any consultation so far as we are aware with any legal representative body such as the Law Society or other court user groups.

22. We are concerned about the impact the criminal court charge may have on a defendant's plea. Despite best advice from a solicitor, it is conceivable that the current charge structure will encourage a defendant to plead guilty even though they may not be. Currently the fee for a conviction for an offence triable either-way on a guilty plea in a magistrates' court is £180. However a conviction for the same offence after a trial is

15 [https://www.nycourts.gov/forms/filingfees.shtml](https://www.nycourts.gov/forms/filingfees.shtml)
16 Supreme Court of Judicature Act (Singapore) Rules of Court Order 110, Rule 47.
£1,000. This large differential in cost may encourage some people to plead guilty rather than face the prospect of a £1,000 charge in addition to any other penalties imposed. Taking a guilty plea may deal with the matter for the defendant in the short-term but the consequences of a criminal record for people are long-lasting and can affect everything from loan applications, employment prospects and ability to obtain a passport for travel.

23. The effect of the criminal court charge on defendants has been punitive due to its non-discretionary, regressive and substantial nature. We have received feedback from our members to this affect.

24. One member told us of a client who was charged with possession of a small amount of cannabis consistent with personal use. The client is suffering from mental health issues and is unemployed. The magistrates were able to take this into consideration when sentencing and so ordered unpaid work. However, the magistrates were bound to impose a £180 criminal court charge in addition to £60 victim surcharge and £85 prosecution costs. Our member is concerned that the £325 in fines in addition to other outstanding amounts will not only go unpaid but worsen their mental health.17

25. Another member informed us about a client who was found guilty of possessing a false document with intent and sentenced to a term of imprisonment with a £100 victim surcharge and £900 criminal court charge. The client is due to be deported at the end of their sentence and so it is unclear how or if the £1,000 in fines will be paid.18

26. Recent media reports have highlighted the use by magistrates of an absolute discharge meaning that a criminal conviction is recorded but no penalty imposed thereby ensuring no criminal court charge is payable. Our members had reported to us that magistrates were considering this option before instances were made public.19

27. The Society believes that the criminal court charge as currently formulated is very high and may in some cases be higher than the actual penalty imposed meaning that the overall amount of charges imposed is out of proportion with the seriousness of the offence. Defendants who appear in court come from the full spectrum of socio-economic backgrounds. The judiciary has no discretion in imposing the charge and so cannot take into consideration a defendant's ability to pay the charge. The knock-on effects of defaulting on payment will continue to hound a defendant long after their original sentence has been served.

28. The government also appears to be considering spending a large sum of money chasing outstanding debts from people who are simply unable to pay. The Society understands that the government is considering awarding a contract20 reportedly worth nearly £700 million to a private company to recover debts.21 At the same time the government is consulting on a proposal to close or merge over one-quarter of the courts and tribunal estate in England and Wales in an attempt to save money. The government has also recently implemented civil court fee increases to the value of £180 million per year and is proposing to raise an additional £48 million through further civil court fee increases. The Society would suggest that it would be better for the government not to spend £700 million chasing money from people who simply do not have the money to pay and instead invest in local courts that can more readily deliver local justice and

17 Email response from member.
18 Email response from member.
19 Email response from member.
20 http://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2015-07-06/5623
lower fees so that people can actually afford to enforce their rights and access justice.

How will the increases to courts and tribunals fees announced in Cm. 9123, "Court and Tribunal Fees", published on 22 July 2015, and the further proposals for introducing or increasing fees included for consultation in Cm. 9123, affect access to justice?

29. The Society provided the government with a comprehensive response to its decision to increase fees as part of the consultation on further fee increases.\(^2\) We provided this response following a survey of our membership in which we sought their views and case studies regarding the impact of the March 2015 increases, the potential impact of the increases announced and further increases proposed in the July consultation paper on their clients and access to justice in general.

March 2015 and recently announced increases

30. The government decided in March 2015 to increase the maximum fee payable for both specified and unspecified money claims to £10,000 (from £1,515) and consulted in July 2015 to increase that fee again to £20,000. We have had concerns regarding the impact of this fee increase for some time.

31. For example, a member has told us of a client who suffered a personal injury while at work. Fortunately they were able to file the claim prior to the March 2015 increase and therefore paid £1,515 in fees rather than the £10,000 payable for the same claim if filed later. This client did not qualify for a fee remission because of some savings which would not have covered the filing fee either and therefore could not have proceeded with their claim.

32. Other members have reported to us the unwillingness of defendants to settle claims as they wait to see if the claimant can find the newly increased fee. Clearly, being unable to afford the fee to pursue your claim or having the defendants engage in such delaying tactics limits an individual’s ability pursue their legitimate claims and access justice.

33. The increase to the maximum fee payable for money claims to £10,000 will also affect access to justice for people bringing personal injury claims including clinical negligence claims, homeowners in disputes regarding their property and small and medium size businesses (SMEs). Members have reported to us that for SMEs, pursuing claims for debt are becoming impossible and unpalatable as finding the £10,000 for filing fees when they’re already out of pocket for the debt in question is not an option.

34. The government announced its decision to increase fees for divorce by 34 per cent in the July 2015 consultation. An increase to £550 from £410 for a divorce will disproportionately affect separating couples on low incomes. This fee increase may even be dangerous as people stay in unsafe relationships because they can’t afford the fee to end it. Alternatively people may be able to afford the fee but offset that cost by not seeking appropriate legal advice affecting their ability to achieve a fair and just settlement. Increases in litigants-in-person also impact upon HM Courts and Tribunals Service staff that must assist people unfamiliar with proper processes and procedures.

Increases consulted on in July 2015

35. We highlighted for the government the impact on intellectual property disputes and judicial review cases of a general uplift of 10 per cent to other civil fees as part of the July 2015 consultation. Members have said to us that the increase in fees for intellectual property claims will defeat the purpose of the Intellectual Property and Enterprise Court as a low-cost and efficient venue for dispute resolution by dissuading business from pursuing claims for intellectual property matters. With respect to judicial review proceedings, increasing fees will limit a citizen’s ability to challenge the exercise of executive power and increase a barrier to justice particularly for the more vulnerable members of our community.

36. The government has also proposed to increase the cost of applications in the First-Tier Tribunal (Immigration and Asylum Chamber). Members have reported to us that these fee increases may increase the likelihood of desperate people not complying with lawful procedures simply because they are unable to afford to. A member told us of a case where because of the fees already involved, a couple could not afford to return to the UK to care for an elderly parent meaning that their care and the costs of their care would fall to local authorities instead.

37. We have also highlighted to the government the impact of an increase in fees for the First-Tier Tribunal (Property Chamber) will have on people of limited means. The effect of the fee increase will be to tip the balance in favour of landlords who can also charge such legal costs to tenants through the property services charge. A member told us of a case where an elderly tenant repeatedly took their landlord to the Tribunal regarding the service charge imposed. The landlord then charged the tenant £24,000 in service charge for the legal fees from the preceding cases. As a claimant on a small pension and not entitled to legal aid, the tenant would not have been able to afford to lodge a claim had the new fees be in existence.

38. The introduction of fees to the First-Tier Tribunal (Tax Chamber) and Upper-Tier Tribunal (Tax and Chancery) will further limit claimant’s ability to access justice. We believe that the government will in effect, impose a financial penalty upon someone exercising a statutory right to challenge the government’s own tax demand.

39. The Society would suggest that the Justice Committee recommend to the government that the March 2015 fee increases be reversed and that the enhanced fees recently consulted upon not go ahead due to the limiting affect they will have on a person’s ability to access justice through the courts and tribunals.

2 October 2015