Introduction

1. The Equality and Human Rights Commission (the Commission) has a statutory duty to promote equality and diversity, work towards the elimination of discrimination, promote human rights and build good relations between and among groups. The Commission has responsibilities in nine areas of equality: age, disability, gender, gender identity, race, religion or belief, sexual orientation, marriage and civil partnership and pregnancy and maternity as well as human rights. It is also a category ‘A’ National Human Rights Institution accredited by the UN.

2. In considering our response, we have had regard to our duties under Section 8(1) Equality Act 2006, which include promoting awareness and understanding of rights under the Equality Act 2010, enforcing that Act, and working towards the elimination of unlawful discrimination. We have also taken into account our duties under Section 9(1) of the 2006 Act, which requires us to promote awareness, understanding and protection of human rights, and encourage public authorities to comply with the Human Rights Act 1998 (HRA).

3. The Commission welcomes the opportunity to respond to this Justice Committee inquiry. The EHRC’s mid-term report on the UK’s progress in fulfilling Universal Periodic Review recommendations raised concerns about the equality and human rights implications of many of the recent changes to civil law justice, including the introduction of Employment Tribunal fees. We raised similar concerns in our recent submissions to the UN on the UK’s implementation of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

4. The Commission has also commissioned a literature review to identify the reported potential and actual equality and human rights impacts of recent changes affecting access to civil law justice, including the introduction of fees for Employment Tribunal claims. The planned publication date for this review is 15 October 2015.

5. It should be noted that, in drafting this response, we have focused on those questions that relate most clearly to our statutory duties outlined above.

**Question 1:** 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?
6. Since July 2013, all Employment Tribunal (ET) claims have been subject to fees. Type 'A' claims require an issue fee of £160 and a hearing fee of £230, while for type 'B' claims there is an issue fee of £250 and a hearing fee of £950. A means-tested fee remission scheme is available, which may provide a reduction or waiver of fees provided both the disposable capital test and the gross monthly income test are satisfied. The fee remission scheme is discussed further below in paragraph 32.

7. Although type 'B' claims are generally more complex – such as claims for discrimination or unfair dismissal, this category also includes claims under the Working Time Regulations 1998. Apart from claims for annual leave, all other claims under these regulations – eg for rest breaks, daily rest or weekly rest – are included in the type ‘B’ category even though they involve no financial loss and are generally uncomplicated.

8. In April 2014, Acas introduced a new ‘early conciliation’ service, under which it is now mandatory for prospective ET claimants to make contact with Acas before pursuing an ET claim, to see if it is possible to resolve the dispute without recourse to the tribunal. Early conciliation can last up to a month and has the effect of ‘stopping the clock’ on the normal ET limitation period for issuing a claim (three months minus a day).

9. The introduction of ET fees has coincided with a significant drop in the number of ET applications. Figures from the Ministry of Justice indicate a 76% decline in claims issued, comparing the first quarter of 2013/14 (when no fees were payable) and the first quarter of 2014/15 (when fees were payable). The same statistics show a drop of 63% in disability discrimination claims, 61% in race discrimination claims, 91% in sex discrimination claims and 75% in equal pay claims. In the last two categories, women represent over four fifths of claimants, indicating a disproportionate impact.

10. The fees may also have a particular impact on women with the protected characteristic of pregnancy and maternity, where there is evidence of discriminatory treatment by employers. Our recent survey into pregnancy and maternity discrimination (jointly commissioned with the Department of Business, Innovation and Skills) found that one in nine mothers (11%) was either dismissed or made compulsorily redundant where others in their workplace were not; or were treated so poorly they felt they had to leave their

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employment. Scaling these findings up to the general population suggests that as many as 54,000 mothers a year are losing their jobs.

11. There is some evidence that ET fees have a deterrent effect on potential ET applicants. For example, research carried out by Citizens Advice found that in over half of claims assessed as having a very good, good or 50/50 chance of success, fees or costs were cited as a reason for the claimants being unlikely to proceed.\(^4\) A recent evaluation of the Acas early conciliation service, based on a telephone survey (1,337 claimant-side and 1,255 employer-side interviews), found that 45% of claimants whose cases did not result in an Acas-conciliated settlement had decided against submitting an ET claim. Among these claimants, the most frequently mentioned reason for not lodging a claim was that the fees were off-putting (cited by over a quarter).\(^5\) Oral evidence from Disability Rights UK to the House of Lords Committee on the Equality Act 2010 and Disability has also suggested a causal link between the drop in claims by disabled workers and the introduction of fees.\(^6\)

12. One of the Government’s stated reasons for introducing ET fees was to reduce the number of unmeritorious claims. Ministry of Justice statistics indicate that success rates have in fact remained broadly the same, rather than increasing. In the four quarters before fees were introduced, success rates ranged between 10% and 9%. In the following four quarters (ie, after the introduction of fees), success rates were 9%, 9%, 5%, and 13%.\(^7\) It should be noted that many of these claims would have been issued before the introduction of fees, so longer term statistics would need to be considered to give a full understanding of the trend in success rates.

13. The Commission’s analysis suggests that the introduction of substantial fees for employment tribunals may be compromising claimants’ rights under Article 6 of the European Convention on Human Rights (ECHR), which protects access to justice in the determination of civil rights and obligations. The particular impact on women may engage Articles 6 read with Article 14 (prohibition of discrimination in the enjoyment of rights). The European Court of Human Rights (EctHR) has interpreted ‘civil rights and obligations’ as including rights under employment law and has held that domestic procedural rules must not affect the very essence of the right of access to the court. Where court fees are payable, the amount should be assessed in the particular circumstances of the case - including the applicant’s ability to pay.\(^8\)

\(^4\) Citizens Advice, 2014. One year on from the introduction of fees to access the Employment Tribunal: summary of results from a survey of employment cases brought to CABx.
\(^7\) NB: Many cases are withdrawn upon being settled. A Government survey reported that around 54% of all cases were settled in 2012 (Department for Business, Innovation and Skills, 2014)
\(^8\) Podbielski v Poland (2005)
A greater justification is required if court fees are imposed at an initial stage of the proceedings.  

14. In 2013 the trade union Unison brought a judicial review challenging the introduction of ET fees, in which the Commission intervened as an interested third party. The application was dismissed\(^9\) because the court decided it could not assess any discriminatory impact of the fee regime so soon after it had been introduced. Unison made a second judicial review application in 2014 (Unison (No 2)), basing its arguments on more recent statistical evidence. Once again, the Commission was a third party intervener. The court dismissed the second application,\(^11\) concluding that it needed examples of actual cases to assess whether there had been an infringement of the ‘principle of effectiveness’ under EU law.

15. Unison appealed against both High Court decisions, with the Commission continuing to intervene. Our intervention advanced legal arguments relating to the principle of effectiveness under EU law; that is, the requirement that national procedural rules must not render practically impossible or excessively difficult the exercise of EU rights. Based on a close analysis of cases decided by the European Court of Justice, we submitted that the ‘excessively difficult’ test for the principle of effectiveness presented a lower threshold than the requirement under Article 6 ECHR that a restriction must not impair ‘the very essence the right of access to the court’. The principle of effectiveness is particularly important in discrimination claims, because protection against discrimination is one of the fundamental aims of the EU and claimants often face particular difficulties in proving their cases. We pointed to Government research indicating that a high proportion of ET awards are never paid, which suggests that successful ET claimants may not recover their tribunal fees.

16. The Court of Appeal dismissed the appeals,\(^12\) on the basis that there was still insufficient evidence to support the Unison’s arguments. Although there had been a significant decline in the number of ET claims, this did not necessarily mean that claimants were unable to pay the fees. The two-tier fee system, with a higher fee for discrimination claims, was objectively justified because it reflected the greater demand they placed on tribunal resources. However, in the lead judgment, Lord Justice Underhill described the question of whether the introduction of ET fees had at least some cases made it not simply unattractive but in practice impossible to pursue a claim as ‘troubling’. He continued by saying (at paragraph 68):

‘Like both Divisional Courts, I have a strong suspicion that so large a decline is unlikely to be accounted for entirely by cases of “won’t pay”

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\(^9\) Weissman v Romania (2006)  
\(^10\) R (on the application of Unison) v Lord Chancellor [2014] EWHC 218 (Admin)  
\(^11\) R (on the application of Unison (No 2)) v Lord Chancellor [2014] EWHC 4198 (Admin)  
\(^12\) R (on the application of Unison) v Lord Chancellor [2015] EWCA Civ 935 CA
and that it must also reflect at least some cases of “can’t pay”; and I have accordingly been tempted by Ms Monaghan’s submission that the figures speak for themselves. But in the end I do not think that that is legitimate. The truth is that, looked at coolly, there is simply no safe basis for an untutored intuition about claimant behaviour or therefore for an inference that the decline cannot consist entirely of cases where potential claimants could realistically have afforded to bring proceedings but have made a choice not to.’

17. Lord Justice Underhill went on to observe (at para 75) that the decline in the number of claims in the Tribunals following the introduction of the Fees Order is sufficiently ‘startling’ to merit a very full and careful analysis of its causes. If this analysis concluded that the decline is partly explained by claimants being unable to afford to bring proceedings, then the level of fees and/or the remission criteria should be revisited.

18. In its role as a National Human Rights Institution, the Commission produces shadow reports on the compliance of the UK Government with its international obligations under the human rights treaties that it has ratified. Our recent submission to the UN Committee on Economic, Social and Cultural Rights on the UK’s Implementation of the International Covenant on Economic, Social and Cultural Rights has highlighted the potentially disproportionate impact of introducing ET fees on access to justice for women, ethnic minorities groups and people with disabilities. We suggested that the introduction of ET fees has had an indirectly discriminatory effect, which runs counter to the UK’s obligations to protect the right to work of all individuals and groups identified by the Committee. We made similar observations in our Mid-term universal periodic review report to the UN.

19. As part of the UK Independent Mechanism on the Convention on the Rights of Persons with Disabilities (CRPD), the Commission contributed to a report on the progress being made to put CRPD rights into practice in the UK. The report called on the UN CRPD committee to ask the UK government to provide evidence of the effect on disabled people of the introduction of fees for ET cases and to detail the steps being taken to ameliorate any negative impact.

Question 2: How has the court fees regime affected the competitiveness of the legal services market in England and Wales, particularly in an international context?

20. This question is not within the Commission’s direct remit.

Question 3: 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. Section 54 of the Criminal Justice and Courts Act 2015 provides that the court must order adults convicted of an offence to pay a criminal courts charge. The charge will not be linked to the offender’s sentence, nor will it be based on any means test; it will be set according to the costs reasonably attributable to a case of that type. The court will disregard the charge when it decides on the appropriate sentence and it will be collected and enforced alongside other financial impositions, including fines, compensation, the victim surcharge and prosecution costs. The charge will also be ordered where an offender makes an unsuccessful appeal.

22. Conviction by a magistrates’ court for a summary offence on a guilty plea will incur a charge of £150, whereas if a defendant pleads not guilty to a summary offence, conviction in the magistrates’ court at trial incurs a £520 charge. In the Crown court, a conviction on a guilty plea costs £900, while those who plead not guilty and are convicted at a trial on indictment must pay £1,200. The charges apply regardless of the gravity of the offence or – where relevant – the value of any property involved.

23. The Ministry of Justice does not appear to have conducted any assessment of the potential equality impact of the criminal courts charge. The Commission is particularly concerned about the impact of the charge on disabled defendants, particularly those with learning disabilities or mental health problems who may experience problems dealing with the criminal justice system. We are aware of research findings indicating that these groups may be placed at a disadvantage when dealing with the court process. Faced with legal advice that they can choose between a lower charge and a higher one, it is possible that a defendant with learning difficulties or mental health problems may place undue weight on the benefit of a ‘cheaper’ option, adding to the pressure to plead guilty from other factors including a potential sentencing discount.  

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17 http://www.legislation.gov.uk/ukpga/2015/2/contents/enacted
18 The charge will not be imposed on offenders who are under 18 at the time of the offence.
19 Section 144 of the Criminal Justice Act 2003 requires the court, when determining the sentence of a defendant who pleads guilty, to take account of the stage in the proceedings when the plea was indicated. This provision is supplemented by guidance from the Sentencing Guidelines Council on reductions in sentence for a guilty plea (2007).
24. Research on the prison population indicates that 62% of male and 57% of female sentenced prisoners have a personality disorder. Over 70% of adult prisoners have a severe mental illness, substance misuse problem or both.

25. A recent report by the National Institute for Health and Care Excellence examined the identification and management of mental health problems for adults in contact with the criminal justice system. The report suggested that identifying mental health problems among those held in police custody is complicated by: the high number of people intoxicated on arrival at the police station; the lack of a standard mental health assessment or standard police training in mental health; and a reliance on self-reporting on mental health problems combined with barriers to disclosure, including stigma and previous negative experiences.

26. Research has also identified that 20 – 30% of offenders have learning disabilities or difficulties that interfere with their ability to cope with the criminal justice system. The Bradley Report concluded that people with learning disabilities may face problems in dealing with the workings of a courtroom, particularly in terms of understanding questions that are leading or complex. Referring to a study that found witnesses with learning disabilities to be more prone to suggestibility and confabulation, the Bradley Report concluded that such defendants, while not necessarily unfit to stand trial, may have problems at a level that requires support in the court environment.

27. Under Article 6(2) of the European Convention on Human Rights, as under the common law, everyone charged of a criminal offence shall be presumed innocent until proved guilty according to law. This means that the accused is entitled to ask the prosecution to be put to proof of his or her guilt. It is an established principle of criminal law that a plea of guilty must be entered.

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25 Article 6 ECHR should be read alongside Article 14(3)(g) of the International Covenant on Civil and Political Rights, which states that everyone is entitled ‘not to be compelled to testify against himself or to confess guilt’.
voluntarily. If at the time of their plea the accused was subject to such pressure that they did not genuinely have a free choice between 'guilty' and 'not guilty', their plea should be treated as a nullity.\(^{27}\)

28. In cases that are legally or factually complex, it is arguable that this principle is particularly important and that financial pressures to plead guilty are inappropriate. The complexity of criminal law may present genuine legal challenges in determining whether a defendant is guilty or innocent of a particular offence. To give one example, under the common law doctrine of 'joint enterprise', a secondary party who assists or encourages the principal offender to commit the substantive offence can be prosecuted and punished as if they were a principal offender, whether or not the offence was pre-planned.\(^{28}\) This doctrine has given rise to different interpretations by courts and academics. Concerns about its application led to the Justice Committee's inquiry in 2011-12,\(^{29}\) which in turn led to the Crown Prosecution Service (CPS) publishing detailed guidance on joint enterprise charging decisions.\(^{30}\) The effectiveness of this guidance has not yet been monitored.\(^{31}\)

29. The Commission supports the recommendation of the Joint Committee on Human Rights that the Government should monitor carefully the impact of the criminal courts charge on the right of defendants to a fair trial, and make available to Parliament the results of that monitoring.\(^{32}\)

**Question 4: 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?**

30. The Commission notes the Government's proposal to increase court fees for divorce petitions from £410 to £550 – i.e, by 34%. This is likely to have a disproportionate impact on women, who are over-represented among divorce petitioners; ONS Statistics (2012)\(^{33}\) indicate that women are the petitioners in 65% of divorce proceedings.

\(^{27}\) *Turner* [1970] 2 QB 321

\(^{28}\) s8 Accessories and Abettors Act 1861

\(^{29}\) House of Commons Justice Committee, Eleventh report of session 2010-12


\(^{31}\) We note that, in its follow up report, the Justice Committee recommended close monitoring of the effectiveness of the CPS guidelines, together with more comprehensive collection of information on joint charging in homicide cases: Justice Committee, Fourth report of session 2014-15

\(^{32}\) Human Rights Joint Committee - Fourteenth Report Legislative Scrutiny: (1) Criminal Justice and Courts Bill and (2) Deregulation Bill

\(^{33}\) http://www.ons.gov.uk/ons/taxonomy/index.html?nscl=Divorces
31. The Ministry of Justice Equalities Statement\(^{34}\) relating to these fee increases acknowledges this disproportionate impact on women. The Statement goes on to conclude that the policy is a proportionate means of achieving a legitimate aim, and would not therefore amount to indirect discrimination. However, case law has established that merely saving costs cannot amount to a legitimate aim.\(^{35}\) It would be very helpful if further analysis were provided to give details of the nature of the legitimate aim beyond (by implication) costs savings, and explain why a substantial increase in fees would be a proportionate means of achieving it.

32. The Equalities Statement also suggests that the impact of the fee increases is mitigated by the availability of the fee remission scheme for courts and tribunals.\(^{36}\) The scheme is relatively complex in nature; an applicant must satisfy both the test for disposable capital and a separate test relating to gross monthly income. Fees may either be remitted in full, or in part. Evaluation of the fee remission scheme is being undertaken as part of the post-implementation review of the introduction of Employment Tribunal fees announced by the Government in June 2015 and due to report at the end of this year. The Commission therefore suggests that implementing the current proposals for enhanced court fees be delayed until the results of this evaluation are known.

33. The Commission will be reporting further on Access to Justice issues in its Shadow Submission to the United Nations Committee on the Elimination of Discrimination against Women (CEDAW) which is planned for publication in December 2015. Our submission is part of the follow up procedure in response to the CEDAW Committee’s 2013 concluding observation to the UK – specifically, the paragraphs on legal aid and access to justice.\(^{37}\)

13 October 2015

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\(^{35}\) Equality Act 2010 Statutory Code of Practice on Services, Public Functions and Association, para 5.29

\(^{36}\) Courts and Tribunals Fee Remission Order 2013
http://www.legislation.gov.uk/uksi/2013/2302/contents/made

\(^{37}\) See paragraphs 22 and 23: