Written evidence from the Public Interest Research Unit

1. SUMMARY
The evidence provided here draws upon the Public Interest Research Unit’s research, including a qualitative study which collected information from 270 disabled workers (Harwood, forthcoming); and upon a review of the literature. The principal points made in this submission are as follows:

- Employment and equality laws have played an important role in reducing disability-related employment disadvantage.
- Enforcement has been so weakened that protections under the Equality Act 2010 have (for many disabled workers) been removed without having been repealed.
- Contrary to Ministry of Justice assurances (MOJ, 2011), tribunal fees have contributed to a dramatic decline in employment tribunal cases. For instance, between the first quarter of 2013/14 and the first quarter of 2014/15, total claims accepted by the employment tribunals went down by 81%, with disability discrimination claims down by 63% (MOJ, 2014: Table 1.2). The evidence does not support government predictions that it would be unmeritorious claims that would principally be deterred.
- Fees have failed to meet any of their indicated objectives, including in relation to reducing public expenditure and encouraging alternative dispute resolution; and have had a devastating impact on access to justice. In addition, research suggests that the reduced and now limited prospect of being taken to an employment tribunal is emboldening some employers to ill-treat their workforce.
- Contrary to claimed predictions in the Ministry of Justice’s pre-fees introduction equality impact assessment (MOJ, 2012), a recent PIRU study (Harwood, forthcoming) indicated that the introduction of fees has had disproportionate adverse impacts on disabled workers.
- This submission makes a series of recommendations aimed at improving access to justice. First amongst these is scrapping employment tribunal fees. The government should also look to whether its fees policy has put it at odds with UK commitments under the UN Convention on the Rights of Persons with Disabilities (CRPD).
- As argued in a forthcoming report (Harwood, forthcoming), tribunal fees appear to be inconsistent with UK obligations under the CRPD, including under Articles 4 (1)(b); 5(2); and 27.

2. BACKGROUND
2.1 The role and limitations of enforcement
Employment and equality laws have played an important role in reducing disability-related employment disadvantage. For instance, adjustments (to working arrangements and the working environment) have facilitated the recruitment, progression and retention of disabled workers (e.g. Horton and Tucker, 2013: 81-83); and the reasonable adjustments duty (now in the Equality Act 2010) has encouraged adjustments (e.g. Dewson et al, 2009: Figure, 4.2). There are also, however, indications that the reasonable adjustments duty, and other equality and employment law protections, are quite often breached (e.g. Lockwood et al, 2014: 4). One of the reasons for this is inadequate enforcement. Problems with enforcement have included the
imbalance in legal representation between the claimant and the respondent employer (e.g. Busby and McDermont, 2012: 167); fear of victimisation dissuading individuals from taking a case (Harwood, forthcoming), with this fear appearing to be frequently justified (O’Sullivan, 2015: 236); the further weighting of tribunal procedures against the claimant with the 2013 Tribunal Regulations (Mangan, 2013: 416-417); the extent to which the Equality and Human Rights Commission has absented itself from the role of an effective enforcement agent (Harwood, forthcoming); and successful claimants having to take further enforcement action in 18 per cent of cases (Harding et al, 2014: 10) to get paid the compensation awarded to them at tribunal. Claimants will not, of course, be disadvantaged in all cases. For example, as Macey points out (Macey, 2012: 488), "many employers are not formally educated and represent themselves, and similarly many claimants are highly educated and have lawyers".

2.2 The new fees system
"The employment tribunal system was created in 1964, and until July 2013, individuals were not required to pay any fees to take their claim to a tribunal" (UK Parliament, 2015). From July 2013, the fee for type A claims, including for non-payment of wages, was set at £160 and the hearing fee at £230; and the fee for type B claims, including claims under discrimination and unfair dismissal law, was set at £250 and the hearing fee at £950. There is, however, a fees remission system. To qualify to pay no fee or a reduced fee, the individual's disposable capital and gross monthly income must be below specified thresholds. Notwithstanding these remissions, the introduction of fees appears to have further undermined the effectiveness of enforcement, with possible consequences for access to justice and employer practice; and with disproportionate adverse impacts on disabled workers and other vulnerable groups.

3. AIMS AND OUTCOMES OF TRIBUNAL FEES
3.1 Financial objectives and outcomes
The first of the three "original objectives", that the Ministry of Justice (MOJ, 2015) lists in its terms of reference, for Review of the Introduction of Employment Tribunal Fees, is - "(a) financial. Transfer a proportion of the costs from the taxpayer to those who use the tribunal where they can afford to do so". From a financial point of view, the introduction of fees has fallen far short of stated expectations. The Trade Union Congress reports (TUC, 2014: 9) that "the government estimated that by introducing fees they would recoup 33 per cent of the total cost of running the employment tribunal system". The TUC (2014: 9) continues, however, - "between July 2013 and March 2014 the gross income from employment tribunal fees ... represents a 'cost recovery' of just 6.7 per cent of the tribunal system's total cost...". This will in part be a consequence of the steep drop in claims submitted; which has been at variance with the MOJ's consultation claim (2011: 19) that "Tribunal users required to pay a fee would not be especially price sensitive ...". In addition, the "where they can afford to do so" caveat, at the end of the above quoted financial objective, appears to entail a justice objective; and, as returned to below, the MOJ's justice objectives might be regarded as lying in tatters.
3.2 Behavioural objectives and outcomes
The second of the three MOJ (2015) "original objectives" is - "(b) behavioural: to encourage parties to seek alternative ways of resolving their disputes". There is little indication that this is happening. On the contrary, Rose et al (2015: 6) found that - "employers have less incentive to negotiate directly with workers or their representatives to reach a resolution", and add - "This is largely because employers know that the worker will have to pay fees even to lodge the ET1 form with the ET". The implication appears to be that employers know that workers cannot afford to go to tribunal, and therefore feel emboldened to ignore their grievances. The evidence to date suggests that there have been three principal types of behavioural impact of the introduction of fees.

- **Fees have contributed to a dramatic drop in tribunal claims.** Between Q1 2013/14 and Q1 2014/15, total claims accepted by the employment tribunals went down by 81%, with disability discrimination claims down by 63% (MOJ, 2014: Table 1.2). It would be disingenuous for the government to claim that this dramatic drop, which coincided with the introduction of fees, was not in large part the consequence of that introduction. In addition, the research so far available suggests that the fees have deterred and will deter large numbers from submitting claims (e.g. Rose et al, 2015: 4; Harwood, forthcoming).

- **Fees have left workers less willing to address ill-treatment in the workplace.** This has been in two principal senses. First, workers will be less inclined to address ill-treatment through taking legal action (e.g. Harding et al, 2014: 5; Harwood, forthcoming). Second, it seems that some workers will also be more reluctant to address ill-treatment through internal approaches, such as grievance procedures (Harwood, forthcoming), as these approaches can lead to dismissal, which (with fees) it is now harder for workers to seek redress for.

- **The reduced and now limited prospect of being taken to tribunal is emboldening some employers to ill-treat their workers.** For this and other reasons, fees, as Rose et al (2015: 3) put it, "negatively alter the power balance between workers and employers". In addition, Harwood (forthcoming) found that "Fees appear to have encouraged or facilitated employer ill-treatment of disabled workers". Further, this is from a starting point at which the employment relationship is already widely recognised to be inherently and highly unequal in the employer's favour (e.g. Harwood, 2015).

3.3 Economic objectives and outcomes
A stated aim of introducing tribunal fees has been to reduce the alleged burden on businesses (e.g. MOJ, 2011: 3), which will in turn, it is claimed, promote economic growth (e.g. Mangan 2013: 412). This covers much of the same ground as government arguments for cutting employment law protections. The laws are a burden in that they require employers to do or not do certain things and tribunals are a burden in that they are designed in part to enforce these requirements. However, these economic arguments are not substantiated, "other than citing in vague terms what 'businesses say' (e.g. BIS 2013)" (Harwood, 2014: 1515); and are, instead, built on a number well-rehearsed myths. First, the myth that workers have too many rights (framed in
terms of excessive "red tape") goes against the evidence that the UK has amongst the weakest employment law protections in the western world (e.g. Hepple, 2013: 213). Second, the UK and European empirical evidence suggests that reasonable levels of employment law protection (i.e. a good distance above those in the UK) are more conducive to economic growth than low levels (e.g. Deakin and Sarker, 2008; Crouch 2012). This is in part, for example, because cuts to employment rights make it easier to hire and fire workers, and so reduce the organisation’s incentive to develop employee skills and knowledge through training and development (e.g. Bassanini and Ekkehard, 2002: 391).

3.4 Justice objectives and outcomes
The last of the three MOJ (2015) “original objectives” is “c. justice: maintain access to justice”. It is clear, however, that fees have severely curtailed access to justice. As referred to above, there was an 81% fall in claims accepted at tribunal between Q1 2013/14 and Q1 2014/15 (MOJ, 2014: Table 1.2). It might be argued (e.g. Beecroft, 2011) that it was too easy in the past to make a claim, and this resulted in many claims being little more than a scam; and from there it might be argued that the introduction of fees has reduced these and other unmeritorious claims. None of these assertions, however, appear to be substantiated. First, as regards it being too easy to pursue a claim, the evidence suggests that claimants will in general face a major struggle, which will often have serious impacts on their health and financial circumstances (e.g. Busby and McDermont, 2012; Harwood, forthcoming; Kirk et al, 2014: 2). Second, there is no evidence that there are a substantial proportion of unmeritorious claims reaching tribunals (e.g. Kirk et al, 2014: 3). Third, the evidence does not support the conclusion that the fee increase has disproportionally deterred unmeritorious claims (e.g. Rose et al, 2015: 5; Harwood, forthcoming).

It had been argued that the fee remission system would help ensure that those who could not afford to pay would not have to (e.g. MOJ, 2012: 7). As the TUC reports (2014: 8), the Ministry of Justice (MOJ) “impact assessment published in June 2013 estimated that” 76.9% of individuals applying for remissions will have part or all of their fees remitted. The TUC continues, however, - “Provisional data provided by the MOJ” shows that “[o]nly 24 per cent of individuals applying for remissions had any or all of their fees remitted”. Those who are not eligible for remission will quite often still find the fees unaffordable (Harwood, forthcoming). For instance, Rose et al (2015: 4-5) report - “Survey respondents observed that despite not being eligible for remission, many clients simply do not have the money available to spend on pursuing a claim at the ET”. In a consultation, the government claimed that fees would help “to safeguard the provision of services, at an acceptable level, that are so important to the maintenance of access to justice” (BIS, 2011: 50). If this was ever a genuine expectation or aim it has not been realised.

3.5 Disability equality assumptions and outcomes.
The MOJ conducted what it described as an equality impact assessment (EIA) of its proposed fee structure (MOJ, 2012). It concludes, with no real
supporting evidence, and in contradiction of the information that respondents provided as part of its consultation, that the proposals would have few if any adverse impacts on equality or equality groups and that "the measures" they "have put in place would mitigate any equality impacts" (MOJ, 2012: 9). This was not a credible position to take at the time. In addition, as subsequent evidence has shown, the introduction of fees is having disproportionate adverse impacts on disabled people. Some of these impacts are addressed below:

- **63% drop in accepted disability discrimination claims between Q1 2013/14 and Q1 2014/15** (MOJ, 2014: Table 1.2). It is self-evident that disabled people are more likely than non-disabled people to experience disability discrimination. Therefore, a measure (in this case tribunal fees) which makes it harder for all groups to take a disability discrimination case to an employment tribunal will have a disproportionate adverse impact on those groups with the greatest likelihood of needing to take such a case i.e. disabled people.

- **MOJ remission assumptions flawed.** The MOJ (2012) EIA appears to assume that the impact of fees will be less on low income groups (including the disabled), since these groups will be eligible for a fee remission. This, however, ignores the fact that individuals can be on low incomes and still ineligible for the fee remission; and these low income individuals will find it particularly hard to pay the fees. Low paid workers appear, for instance, to have been particularly disadvantaged by the need to pay a fee to claim outstanding wages (Rose et al, 2015: 5); and, as referred to above, the MOJ greatly over-estimated the number of people who would successfully claim a remission.

- **Reduced access to justice could be encouraging discrimination.** The MOJ EIA states (MOJ, 2012: 23) - "Respondents say that as fees will deter claims, employers will no longer have regard for equality legislation". The EIA response is to dismiss the possibility of this adverse impact on the grounds that there is no evidence to suggest what the impact of fees will be on behaviour. At the same time, however, the EIA concludes that the introduction of fees will have little or no adverse impact on behaviour. This seems to be remarkable logic. In addition, the evidence to date is that fees have deterred workers from taking discrimination claims (e.g. MOJ, 2014: Table 1.2) and are emboldening some employers to discriminate against disabled workers (Harwood, forthcoming).

### 4. RECOMMENDATIONS

PIRU's research suggests that tribunal fees often deter claims in combination with other deterrents, such as the absence of legal representation. We therefore make recommendations in relation to a range of barriers to justice.

- **Scrap the tribunal fees which came into force in July 2013.**
- **Make legal aid available for all employment cases and set the eligibility criteria so as to ensure access to justice.**
- **Reinstitute the statutory discrimination questionnaire procedure, which provided a mechanism whereby employees could obtain more information from an employer to determine whether an unlawful act had taken place and to use in any subsequent proceedings.**
- Amend the Employment Tribunal regulations, so as to reduce the disadvantage that unrepresented parties are placed at. In particular, moderate tribunal powers to dismiss claims for specified failures, such as failure to provide minimum information (regulation 10 of the 2013 Regulations).
- Introduce a statutory duty (possibly through an addition to the Equality Act 2010 Public Sector Equality Duty specific duties) for the tribunal service to assess what if any reasonable adjustments each claimant and respondent might need to ensure that they are not placed at a substantial disadvantage in relation to employment tribunal services. This should include consultation, except where the individual does not wish it.
- Unions to be given more powers to support individual members who complain of workplace discrimination.

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REFERENCES


At: [http://www.tandfonline.com/doi/abs/10.1080/09687599.2014.958132#.VGH_RSPl_s89](http://www.tandfonline.com/doi/abs/10.1080/09687599.2014.958132#.VGH_RSPl_s89)


